Hafizzuddin bin Noordin v Pacific & Orient Insurance Co Bhd

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12B-39–04 OF 2014
AZMI ARIFFIN JC
22 SEPTEMBER 2014

Civil Procedure — Time — Extension of — Application of — Action based on road accident — Delay in filing record and memorandum of appeal for 17 days — Delay attributable to solicitor's temporary office boy — Whether there was blatant infringement of rules which was so significant or serious — Whether such infringement occasioned prejudice to adverse party or to due administration of justice

This appeal concerned an application for the extension of time. The motorcycle which the plaintif was riding had collided with another motorcycle resulting in serious injuries to both motorists. The plaintiff then filed their claim against the defendant as an insurer for a period in which the accident occurred. The question that arose was whether the defendant was liable to indemnify their insured for the damages awarded by the sessions court. The defendant refused to honour the said judgment, citing that the insurance policy did not cover for the insured as the defendant alleged that 'Lebuh raya Outer ring road belum diwarta dan belum dibuka untuk kegunaan awam'. The action against the defendant was for the recovery of the judgment sum. The reason for the delay in filing the record and memorandum of appeal and the record of appeal of 17 days was said to be caused by the solicitor's temporary office boy ('Rosli'). This issue for determination was whether there was blatant infringement of rules due to Rosli's mistake which was so significant or serious and whether such infringement had occasioned prejudice to the adverse party or to the due administration of justice.

Held, allowing the application:

(1) Rules of court must prima facie be obeyed. The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time given disposal of litigation within a reasonable time given scale. The nature of infringement would determine whether prejudice to the due administration of justice had occurred. Surely, a short period of delay in filing a document would not cause any prejudice to the due administration of justice provided it had good reasons for doing so (see para 6).

(2) There were merits placed which justified the exercise of judicial discretion in favour of the appellants to grant an extension of time to file the record

of appeal. There was no intention to ignore or flout the rules. This can be seen from the subsequent conduct of the applicant where upon realising the mistake done, the applicant still filed the memorandum and record of appeal without notes of proceeding and grounds of judgment. In the circumstances, the respondent could not be said to have been seriously prejudiced by the non-compliance of the rule and there was reasonable explanation given for the delay (see paras 8–9).

(3) The delay of 15 days was not grossly inordinate delay and the respondent knew that there was in all likelihood to be an appeal as notice of appeal had been filed. No undue prejudice would be occasioned to the respondent. Even assuming that there was such prejudice could be compensated by way of costs. This was therefore a fit case to disregard the lapse of time (see para 11).

[Bahasa Malaysia summary

Rayuan ini adalah berkenaan permohonan untuk pelanjutan masa. Motosikal yang dinaiki oleh plaintif berlanggar dengan motosikal lain menyebabkan kecederaan serius kepada kedua-dua penunggang. Plaintif kemudiannya memfailkan tuntutan mereka terhadap defendan sebagai syarikat insurans untuk tempoh di mana kemalangan berlaku. Persoalan yang berbangkit adalah sama ada defendan adalah bertanggungjawab untuk membayar pengambil insurans untuk ganti rugi yang diawardkan oleh mahkamah sesyen. Defendan enggan untuk menghormati penghakiman tersebut, dengan menyatakan bahawa polisi insurans tidak melindungi untuk pengambil insurans seperti yang didakwa oleh defendan bahawa 'Lebuh raya Outer ring road belum diwarta dan belum dibuka untuk kegunaan awam'. Tindakan terhadap defendan adalah untuk mendapatkan semula jumlah penghakiman. Alasan untuk kelewatan dalam memfailkan rekod dan memorandum rayuan dan rekod rayuan selama 17 hari dikatakan disebabkan oleh pekerja pejabat sementara peguam ('Rosli'). Isu untuk penentuan adalah sama ada terdapat perlanggaran terang-terangan terhadap peraturan akibat kesilapan Rosli yang sangat penting atau serius dan sama ada perlanggaran sedemikian telah mengakibatkan prejudis kepada pihak menentang atau kepada pelaksanaan keadilan.

Diputuskan, membenarkan permohonan:

(1) Peraturan mahkamah mesti prima facie dipatuhi. Peraturan yang wujud mengandungi had masa yang dicipta untuk mencapai pelupusan tindakan undang-undang dalam masa yang munsabah yang diberikan pelupusan tindakan undang-undang dalam skala masa munasabah yang diberikan. Sifat perlanggaran akan menentukan sama ada prejudis kepada perlaksanaan keadilan telah berlaku. Semestinya, tempoh singkat kelewatan memfailkan dokumen tidak akan menyebabkan apa-apa prejudis kepada perlaksanaan keadilan dengan syarat ia mempunyai

alasan yang baik untuk berbuat sedemikian (lihat perenggan 6).

(2) Terdapat merit diletakkan yang menjustifikasikan pelaksanaan budi bicara kehakiman memihak perayu-perayu untuk memberikan pelanjutan masa untuk memfailkan rekod rayuan. Tidak terdapat niat untuk tidak mempedulikan atau melanggar peraturan. Ini dapat dilihat daripada kelakuan seterusnya pemohon di mana selepas menyedari kesilapan dibuat, pemohon masih memfailkan memorandum dan rekod rayuan tanpa nota prosiding dan alasan penghakiman. Dalam keadaan ini, responden tidak dapat dikatakan diprejudiskan secara serius dengan ketidakpatuhan peraturan dan terdapat penjelasan munasbah yang diberikan untuk kelewatan tersebut (lihat perenggan 8–9).

(3) Kelewatan 15 hari bukanlah terlampau lewat dan responden mengetahui bahawa mungkin terdapat rayuan memandangkan notis rayuan telah difailkan. Tiada prejudis yang tidak wajar akan berlaku kepada responden. Walaupun dengan menganggap bahawa terdapat, prejudis sedemikian boleh dipampaskan melalui kos. Ini oleh itu adalah kes betul untuk tidak mempedulikan luput masa (lihat perenggan 11).]

Notes

For cases on extension of time, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 10232–10289.

Yahaya bin Hahim (Yahaya & Partners) for the appellant.
Malar (Hoe & Ahmad Zaki) for the respondent.

Azmi Ariffin JC:

[1] This appeal concerns an application for the extension of time to file the record and memorandum of appeal.

BACKGROUND

[2] According to the plaintif (SP3) who was riding motorcycle No PGJ 5678 on the day of the accident (11 October 2005) he was from his house at Taman Tun Dr Awang, Pantai Bersih to Sungai Puyu. Accident occurred along Butterworth Outer Ring Road when the plaintiff collided with the rider of motorcycle PFS 3610. Both rider suffered serious injuries. In short the plaintiff then filed their claim against the defendant as an insurer for a period in which the accident occurred. At the conclusion of the trial the learned sessions court judge on 12 March 2014 gave judgment in favour of the defendant.

[3] Here, the question is whether the defendant (as insurer of motorcycle No PGJ 5678) liable to indemnify their insured for the damages awarded by the sessions court. The defendant refused to honour the said judgment, citing that

the insurance policy does not cover for the insured as the defendant alleged that 'Lebuh raya Outer ring road belum di warta dan belum di buka untuk kegunaan awam'. The action against the defendant is for the recovery of the judgment sum.

[4] Through the affidavit in support affirmed by Yahaya bin Hashim on 5 May 2014, the reason for the delay in filing the record and memorandum of appeal by and the record of appeal of 17 days was said to be caused by the solicitors temporary office boy ie Rosli bin Abdul Rahman. Paragraphs 7, 8, 9 dan 12 affidavit in support by Yahaya bin Hashim stated that:

> 7. ... saya sesungguhnya menyatakan bahawa tanpa menyedari terdapat satu rayuan berkenaan kes ini, fail ini telah diikatkan bersama fail lama yang lain secara tak sengaja dan tanpa arahan di simpan di dalam stor simpanan oleh budak pejabat sementara Rosli bin Abdul Rahman. Setelah di cari di seluruh pejabat dan bilik stor maka fail ini dan lain-lain fail juga dijumpai.
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> 8. Ini merupakan satu tindakan yang tidak disengajakan dan kami tidak sama sekali mempunyai niat untuk menghina ataupun melengahkan masa Mahkamah Yang Mulia ini.
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> 9. Saya sesungguhnya mengatakan bahawa Notis Rayuan telah difailkan pada 18.3.2014 dan menurut Aturan 55 Kaedah-Kaedah Mahkamah 2012 tarikh akhiruntuk memfailkan memorandum Rayuan dan Rekod Rayuan ialah pada 18.4.2014 walaupun Nota-Nota Keterangan dan Alasan Penghakiman tidak disediakan. Namun demikian disebabkan kesilapan yang tidak disengajakan, pihak kami tidak dapat memfailkan Memorandum dan Rekod Rayuan.
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> 12. Saya sesungguhnya menyatakan bahawa Perayu/Plaintif telah pun mengambil langkah-langkah positif agar tidak melengahkan masa Mahkamah selanjutnya di mana pihak kami telah memfailkan Rekod Rayuan tanpa mengandung Nota-Nota Keterangan dan Alasan Penghakiman pada 2.5.2014 dan demikian memohon untuk *'abridgement of time*'. (Emphasis added.)

[5] This issue for determination is whether there is blatant infringement of rules due to the mistake of the solicitors staff (Rosli bin Abdul Rahman) which is so significant or serious and such infringement has occasioned prejudice to the adverse party or to the due administration of justice. If the transgression is significant and displayed total disregard of clearly expressed rules, the court should not in the real sense of words allowed for an extension of time. The granting or dismissal of such of an application for is very much a discretionary matter.

[6] It is trite law that rules of court must prima facie be obeyed. The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time given disposal of litigation within a reasonable time given scale. The nature of infringement would determine whether prejudice to the due administration of justice had occurred, surely, a

short period of delay in filing a document would not cause any prejudice to the due administration of justice provided it has good reasons for doing so.

[7] I had examine the affidavits and the written submission from both counsel to determine the nature of the breach and to see whether the mistake on the part of the office boy is excusable for granting and extension of time to file a memorandum of appeal and appeal record.

[8] After perusing the contents of his affidavits, I find that there is merits placed before me which justifies the exercise of my judicial discretion in favour of the appellants to grant an extension of time to file the record of appeal.

[9] Going by the conduct of the appellant. I do not think that there was any intention to ignore or flout the rules. This can be seen from the subsequent conduct of the applicant where upon realising the mistake done, on 2 May 2014 the applicant still file the memorandum and record of appeal without notes of proceeding and ground of judgment. In the circumstances, the respondent could not be said to have been seriously prejudiced by the non-compliance of the rule and there was reasonable explanation given for the delay.

[10] It is quite plain to this court that an application for an extension of time relying on the mistake on the part of solicitor's staff should not be dismissed outright but should be considered together with other relevant factors. In the exercise of its judicial discretion the court will normally consider:

(a) the reasons given for the delay;

(b) the length of the delay;

(c) the conduct of the party;

(d) the merits of the appeal; and

(e) the degree of prejudice to the respondent.

These factors are merely served as a guide for the purpose of exercising the discretion and are not intended to be rigid mandatory requirement that all the five factors must be in favour of an applicant in order that the discretion may be exercised to the benefit for the applicant.

[11] On consideration of the whole matter, it is my considered views that the delay of 15 days is not grossly inordinate delay and the respondent knew that there was in all likelihood to be an appeal as notice of appeal had been files on 18 March 2014. No undue prejudice would be occasioned to the respondent in the instant case. Even assuming that there was such prejudice could be

compensated by way of costs. This is therefore a fit case to disregard the lapse of time.

[12] Having regard to all the circumstances of the case, the application must therefore be allowed and the applicant is given two weeks from receipt of the ground of judgment and notes of evidence to file supplementary record of appeal. In the interest of justice, I order that the appellant/applicant do pay to the respondent RM500 costs for the day as this application was brought by the appellant on the basis of the mistake of the solicitor staff concerned.

Application allowed.

Reported by Afiq Mohamad Noor